Supreme Court, U.S.
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No. 00-75

IN THE
Supreme Court of the United States

MICHAEL WADE, *et al.*,
Petitioners,

v.

DIANE COUGHLIN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a final order of dismissal that disposes of all claims in a case, may plaintiffs who have not obtained a judgment, a consent decree or a settlement agreement, or otherwise materially altered the legal relationship between the parties, be deemed prevailing parties for purposes of obtaining attorneys' fees under federal fee-shifting statutes?

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STATEMENT OF THE CASE

Petitioners are former residents of the Great Oaks State Residential Center for the Mentally Retarded in Silver Spring, Maryland. An individual is admitted to a state residential center in Maryland if the individual has mental retardation and needs residential services for habilitation, and there is no less restrictive setting with the needed services available for the individual. *See* MD. CODE ANN. HEALTH GENERAL ART. §7-502 (Repl. Vol. 1995). Each of the plaintiffs has mental retardation and other serious disabilities. (J. A. 32-42.)[1]

In September 1991, plaintiffs, through their next friends and counsel, filed suit against various officials of the Maryland Department of Health and Mental Hygiene and its component division, the Developmental Disabilities Administration. (J. A. 7, Docket No. 1.)[2] Plaintiffs claimed that conditions at Great Oaks violated their rights under the Constitution and the Rehabilitation and Americans with Disabilities Acts, and asked as relief that they be transferred to State-funded community placements and that defendants be enjoined from admitting new residents into Great Oaks. (J. A. 55-58.)

Defendants had already been placing persons out of Maryland institutions into State-funded community placements for years, and continued to do so after suit was filed. Great Oaks continued to "down-size" throughout the litigation and, in December 1994, William Donald Schaefer, who was the Governor of Maryland at that time, announced

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[1] References to "J. A." are to the Joint Appendix filed with the Court of Appeals in this case.

[2] Since the law suit was originally filed, the identity of these state officers has changed several times, and, pursuant to Fed. R. Civ. P. 25(d), the officers' successors have been substituted as parties.

the State's intention to close the center. In July 1995, his successor, Governor Parris Glendening, confirmed that decision and reiterated that Great Oaks would close at the end of that fiscal year, *i.e.*, by June 1996. (J. A. 1-28; J. A. 235.)

As the fee petitions in this case demonstrate, the great bulk of discovery took place after this second, confirmatory announcement. (J. A. 619-628.) In January 1996, defendants filed a motion to dismiss or to stay, on the basis that the Center would be closed and the case would be rendered moot before trial took place. (J. A.163.) Plaintiffs opposed both the dismissal and the stay. Dismissal was opposed on the basis that mere closure of the Center and placement of the residents into the community was not sufficient to guarantee the residents' rights. Rather, plaintiffs now further insisted that "the need to remedy the lingering effects of the State's prior illegal conduct requires more than a change in residential placement, [and] there is a reasonable expectation that the State will return to its wrongful practice of confining to an institution persons with disabilities who can live in integrated settings." Plaintiffs' February 9, 1996 Memorandum in Opposition to Defendants' Motion to Dismiss or in the Alternative to Stay, at 26. Plaintiffs opposed the stay on the grounds that the closure would not resolve the case. *Id.* at 34.

In March 1996, the Court denied defendants' motion to dismiss, but granted their motion to stay the proceedings. (J. A. 26, Docket No. 172.) At the same time, plaintiffs moved for an interim award of attorneys' fees, claiming fees of more than $600,000 for private counsel, Swidler & Berlin, since its entry into the case a year earlier. (J. A. 225.) The State filed a status report on July 1, 1996, reporting that the Center had in fact been closed (J. A. 27, Docket No. 180), and an opposition to the fee petition in September 1996 (J. A. 634 *et seq.)* After the case had lain dormant for two years, plaintiffs in March 1998 filed a supplemental petition for fees of more than $400,000 for the

non-profit entities that had taken part in their representation. (J. A. 27, docket No. 186; J. A. 638.) The total amount of fees claimed was $1,081,588.26.

The parties' stipulation of dismissal was approved by the district court in March 1999 (J. A. 189) and, on the same day, the court issued a memorandum and order denying plaintiffs' attorneys' fee request. (App. 13a.) Relying on *S-1 and S-2 By and Through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994)(*en banc*) (adopting Judge Wilkinson's dissenting panel opinion in *S-1* at 6 F.3d 160, 168-172 (4th Cir. 1993), the court stated that, "[f]ollowing *Farrar v. Hobby*, 506 U.S. 103 (1992), the Fourth Circuit concluded that '[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party.'" (App. 13a.)

Although the court suggested that plaintiffs had made a substantial showing that they had been a catalyst, it specifically did not resolve that issue, preserving defendants' right at a later date to rebut the factual allegations in plaintiffs' petition, should that become necessary. (App. 12a-13a, n3.) Indeed, defendants had limited their opposition to the fee petition to the legal issue; did not present evidence or argument regarding the cause of Great Oaks' closure; and reserved the right to respond to the factual allegations regarding causation and to dispute the reasonableness of the amount of fees requested. (J. A. 634-635.)

The district court also refused to accept plaintiffs' theory, raised for the first time at argument in April 1998, that hearings provided by the Secretary of Health and Mental Hygiene to remaining Great Oaks' residents and their parents in early 1996 constituted an alteration in the legal relationship of the parties sufficient to make plaintiffs prevailing parties. (App. 14a n.6.)

After having lingered on the court's docket for almost eight years, the case was finally dismissed three years after the Great Oaks Center was closed. There had not been a single finding of fact by the district court and there had been no final judgment, no consent decree, and no settlement agreement. As Petitioners recognized, the State was not legally barred from returning to a policy of institutionalization. Plaintiffs' February 9, 1996 Opposition at 26.

Petitioners appealed the district court's decision, and filed a petition for a hearing *en banc* that was denied. The Court of Appeals affirmed on the reasoning of the district court. (App. 9a.)

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court because the rule of law applied by the Fourth Circuit here wholly complies with the decisions of this Court, and the purported conflict between the Fourth Circuit and other circuits on the application of the "catalyst" theory to requests for attorneys' fees is more a question of semantics than of substance. In stating that prevailing party status is contingent on the existence of an enforceable judgment, consent decree, or settlement agreement, the Court of Appeals in this case has merely identified the bright-line criteria it uses for determining whether a material change in the legal relationship has occurred that would give rise to a fee award. There was no such change in this case.

While Petitioners at one point in this litigation decried the "reasonable expectation that the State may return to its former policy" and thus insisted on injunctive relief "to assure that the State does not revert, for budgetary or other reasons, to its prior illegal practices," Plaintiffs' February 9, 1996 Opposition at 9, they abandoned that request for relief when they dismissed this case. Thus, although Maryland has no intention to do so, it is free to

return to the precise behavior that triggered this litigation. There has been no change in the legal relationship of the parties, and, therefore, this is not the appropriate case for determining whether the "catalyst" theory remains viable. Under the well-settled precedents of this Court and the lower appellate courts, Petitioners are not entitled to attorneys' fees.

I. The Rule of Law Applied By The Fourth Circuit To Determine Applicability Of The Fee Shifting Statutes Fully Complies With The Decisions Of This Court.

The standard the Court of Appeals used in this case in determining Petitioners' fee eligibility does not warrant review because it closely follows this Court's rulings: Petitioners have failed to identify any significant change in their legal relationship with Maryland giving rise to the right to a fee award. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989). As this Court recognized in *Farrar v. Hobby*, 506 U. S. 103 (1992), "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Citing this language, the Court of Appeals in its *en banc* decision in *S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (adopting Judge Wilkinson's dissenting opinion in 6 F.3d 160, 168 (4th Cir. 1993), *cert. denied*, 513 U.S. 876 (1994)), identified three ways in which it is possible to change the legal relationship of parties in litigation: by judgment, consent decree, or settlement agreement enforceable by a court. As this case illustrates, because Petitioners achieved none of these, the Court of Appeals' approach is neither legally remarkable nor improper.

"It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award . . . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). A voluntary change in conduct by the defendant may suffice, *id.* at 760-61, but such a change does not necessarily include anything more than the three routes set forth in *Farrar* that the Court of Appeals has adopted as its attorneys' fee benchmark. Rather, the third "settlement" route in *Farrar* may be assumed to include both monetary settlements and agreements to change conduct. A plaintiff who secures a settlement agreement, either for money or a change in conduct, will have prevailed without a formal judgment. However, the settlement must be contained in a legally enforceable agreement in order to change the legal relationship between the parties and create prevailing party status. *S-1*, 6 F.3d at 171.

Petitioners current argument is completely contrary to the position they previously espoused in opposing the State's motion seeking the dismissal of this case. That position demonstrated their failure to achieve a change in legal relationship. When the State argued that closing Great Oaks rendered this case moot, Petitioners actively opposed the motion to dismiss, arguing that "cessation of illegal activity in the face of a lawsuit does not render a case moot, particularly when the illegal activity is as widespread and longstanding as its has been in this case." February 9, 1996 Opposition at 4.

Petitioners accordingly argued in the District Court that the State had not met its burden of showing that the challenged conduct would not recur, and contended that, "[a]bsent the force of a court injunction, there can be no assurance that the State will not revert to its prior, longstanding practice of confining certain class members to large institutions, even though they could live in more integrated settings." February 9, 1996 Opposition at 25. *See also id.* at 30 (claiming that there is a "reasonable expectation that the State will revert back to those policies

once it believes it is no longer at risk of an adverse judgment"); *id.* ("Despite its repeated insistence, the State cannot insure that residents will not be returned to Great Oaks, or, for that matter, will be moved to another institution elsewhere in the State for lack of community supports.").

Petitioners subsequently abandoned their efforts, however, to secure such injunctive relief. Thus, as their own papers filed in this case have recognized, the change of behavior at issue here created no material alteration in the legal rights of Petitioners or other disabled persons, or in their legal relationship with the State of Maryland. Without being required to do so by a judgment, consent decree, or enforceable settlement, the State closed the Great Oaks Center and placed its residents, including Petitioners, in the community. Although it has no intention to do so, and, indeed, takes great pride in its strong commitment to community placements, the State of Maryland is free to re-open a Great Oaks or other similar residential center, de-fund community placements, and re-institutionalize Petitioners and those similarly situated, within only the constraints set forth in *Olmstead v. L.C. ex rel. Zimring*, 119 S.Ct 2176 (1999), and pre-existing State law standards.

Application of the Court of Appeals' criteria for determining prevailing party status in this case is entirely consistent with this Court's decisions. The underlying holding of the Court of Appeals rests on the legally unremarkable principle that a party has not prevailed and is not entitled to attorneys' fees absent a judgment, a consent decree, an enforceable settlement, or any other material alteration of his or her legal relationship with the defendant. Further review of this case is therefore not warranted.

II. The Purported Conflict Between The Fourth Circuit And Other Circuits Is Overstated.

Although Petitioners make much of the Fourth

Circuit's supposed disagreement with other circuits, a close reading of the pertinent cases reveals that the Court of Appeals' analysis and application of prevailing party law is not substantially different from that of most other circuits, often a difference of semantics rather than substance. Even in some of those circuits that purport to apply the catalyst theory, the "touchstone of the prevailing party inquiry" set out in those cases – a material alteration of the legal relationship between the parties – has nevertheless been implicitly or explicitly incorporated into their prevailing party inquiry. In *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236 (1st Cir. 1993), for example, Congress passed federal legislation providing plaintiffs with the relief they sought, thus providing a material change in the parties' legal relationship. *Id.* at 237-38. Similarly, in *New Hampshire v. Adams*, 159 F.3d 680, 683 (1st Cir. 1998), the court recited the need for relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* (quoting *Farrar*, 506 U.S. at 111-12).

Although the Second Circuit explicitly retained the catalyst test in *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995), the same court several months later, in *Association for Retarded Citizens of Connecticut v. Thorne*, 68 F.3d 547 (2nd Cir. 1995), ignored *Marbley* and observed that "[r]ecent Supreme Court cases have stated that the key to determining whether a party prevails is whether the litigation resulted in an alteration of the legal relationship between the parties. [citations omitted] The 'plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement.'" 68 F.3d at 552 (quoting *Farrar*, 506 U.S. at 111) (ellipsis in original). The court concluded that no such change in legal relationship had occurred, but held that, in any case, the lower court no longer had subject matter jurisdiction. *Assn. for Retarded Citizens*, 68 F.3d at 552.

Likewise, although the Seventh Circuit in *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994), explicitly retained the catalyst theory, the defendant in that case had adopted a new Medical Assistance regulation providing plaintiffs the relief they sought, *id.* at 274, thus providing a material alteration in the legal relationship between the parties. The Seventh Circuit more clearly applied the material alteration test in *Board of Education of Downers Grove Grade School v. Steven L.*, 89 F.3d 464 (7th Cir. 1996), in holding that the plaintiff could not be considered to have substantially prevailed because the outcome of the suit had resulted in no enforceable obligation on the part of the school district, and no relief was in the form of a judgment or enforceable settlement. *Id.* at 468.

Similarly, while the Eleventh Circuit in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1205-07 (11th Cir. 1999), explicitly held that the catalyst test survived *Farrar*, the court nevertheless defined the first prong of the catalyst test as requiring that the plaintiffs show that their legal action created a "material alteration of the legal relationship of the parties." *Id.* at 1207.

The Fifth Circuit stated in *Foreman v. Dallas County, Texas*, 193 F.3d 314 (5th Cir. 1999), that it has never fully explored the impact of *Farrar* on the viability of the catalyst theory and that it has never addressed the issue directly. *Id.* at 320. The court stated that *Farrar* places the continuing validity of the catalyst theory in serious doubt, as its language "strongly suggests that the plaintiff must obtain some merits-based relief which alters its legal standing with the defendant before it may claim prevailing party status." *Id.* at 320. However, the court declined to "engage in that close debate," holding that, if the catalyst theory still applies, the facts did not support a finding that the plaintiff had either obtained the relief he sought by the legislative change that ended the case, or proved that he was

the cause of that change. *Id.* at 320-321.[3]

In several of the cases cited by Petitioners, there existed a judgment, consent decree, or settlement agreement that supported the attorneys' fee request. *See Kilgour v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir. 1995) ("Kilgour obtained an enforceable stipulated judgment requiring the City to make substantial modifications to the Rose Bowl press box."); *Beard v. Teska*, 31 F.3d 942, 944 (10th Cir. 1994) ("In June 1990 the plaintiff class, Departments and Sand Springs entered into a Settlement Agreement under which the Education Department assumed the responsibility. . . ."). As this Court has explicitly recognized, such relief establishes prevailing party status. *See Farrar*, 506 U.S. at 111; *Maher v. Gagne*, 448 U.S. 122, 128 (1980). The prevailing party standard that the Court of Appeals applied in this case does not conflict with cases such as these, in which the courts merely applied the catalyst theory to determine whether the plaintiff's efforts were causally related to the relief obtained.

Thus, the rule of law applied by the Fourth Circuit to

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[3] The court also noted that the possible conflict between *Farrar* and the catalyst theory was not addressed in either of the Fifth Circuit cases cited by petitioners here (Petition at 13) as standing for the proposition that the Fifth Circuit has definitively retained the catalyst theory after *Farrar*. *See* 193 F.3d at 320-21. Indeed, in *Pembroke v. Wood County*, 981 F.2d 225 (5th Cir. 1993), the court attempted to distinguish *Farrar* as limited to suits seeking money damages, but did not discuss its potential conflict with the catalyst theory. In *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993), the court acknowledged the issue, and questioned whether the catalyst theory was still good law, but reached no resolution because the plaintiff had not shown causation in any event. Thus, the Fifth Circuit has never spoken definitively on the issue.

determine prevailing party status is not substantively different from that applied by a number of the circuit courts with which Petitioners claim a conflict exists. In none of those courts is a party entitled to fees in a case such as this, where there was no material alteration of legal rights.

As this Court emphasized in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1978), "when a district court awards counsel fees to a plaintiff, it is awarding them against a violator of federal law." No such finding has ever been made in this case. The closure of Great Oaks and placement of its residents in the community, were voluntary and unaccompanied by an enforceable judgment, consent decree, settlement, or anything else representing a material change in the State's legal relationship with Petitioners. This case thus presents no question that warrants the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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